(31)

Supreme Court of the United States

OCTOBER TERM 1942

No. 337.

ARMAND TOKATYAN,

Petitioner,

against

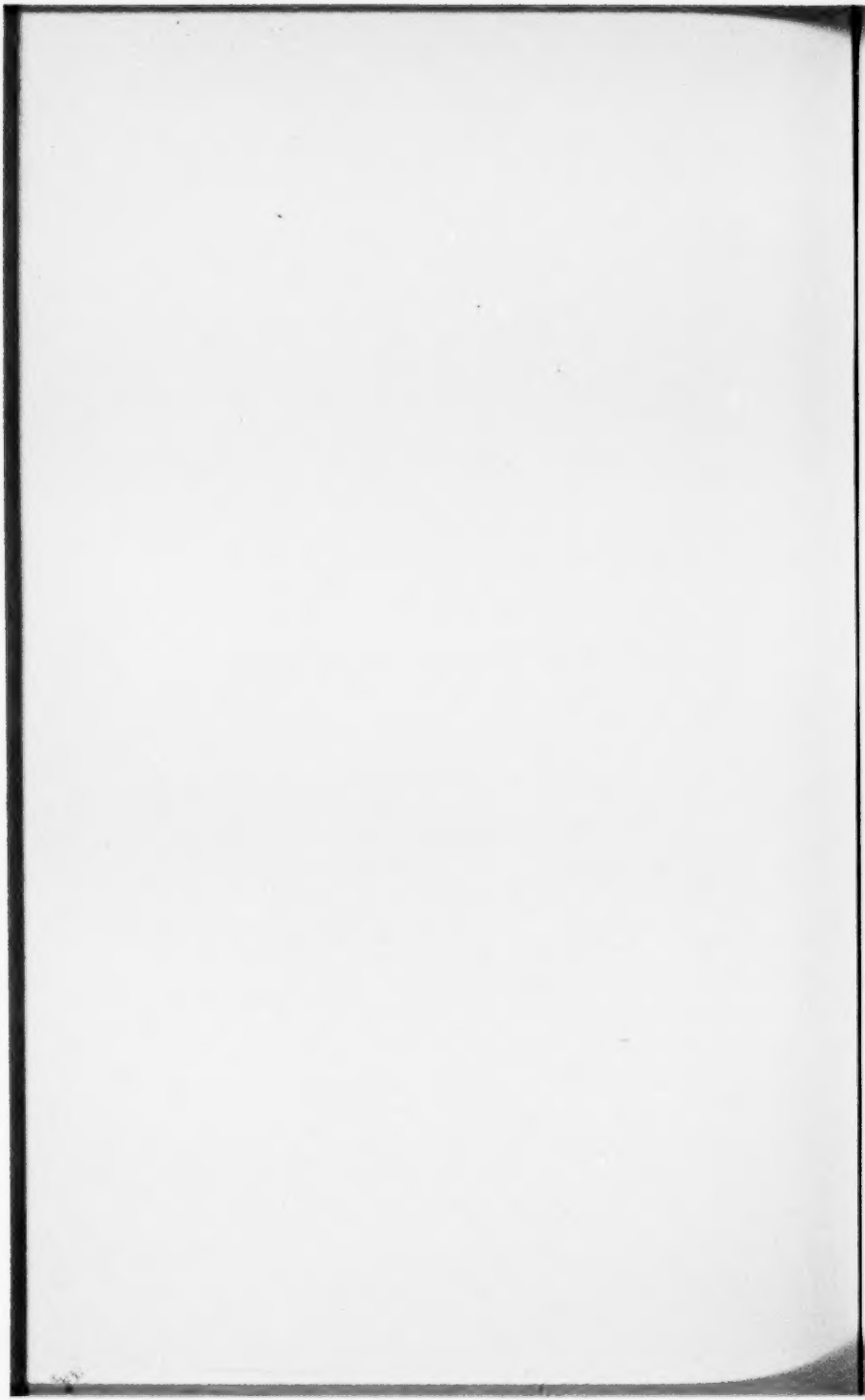
MAX CHOPNICK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

Benjamin Pepper

LOUIS P. RANDELL,
Attorney for Petitioner.



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Supreme Court of the United States

OCTOBER TERM 1942

No. ————.

ARMAND TOKATYAN,

Petitioner,

against

MAX CHOPNICK,

Respondent.

Petition for Writ of Certiorari

TO THE HONORABLE THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, on behalf of the above named Petitioner, prays that a writ of certiorari issue to review the determination of the United States Circuit Court of Appeals for the Second Circuit, which reversed an order of the United States District Court for the Southern District of New York, which order denied a motion by respondent to vacate an ex-parte order of the said District Court restraining and enjoining the respondent from proceeding with two certain actions brought by the respondent against the petitioner in the City Court of the City of New York, State of New York.

Statement

The bankrupt had obtained a discharge in a bankruptcy proceeding, on February 20th, 1935. On November 12th, 1940, the bankrupt filed a second petition in bankruptcy. In this proceeding, a discharge was denied him on the ground that six years had not elapsed between the bankrupt's discharge in the first proceeding and the filing of

his petition in the second proceeding. Thereafter, on October 8th, 1941, which was subsequent to six years from the discharge granted in the first proceeding, the bankrupt filed his bankruptcy petition in the present proceeding.

In this proceeding, the bankrupt obtained an order staying two actions brought by the respondent in the Courts of the State of New York, which were based upon a contract liability for services rendered by the respondent to the bankrupt. An application by the respondent to vacate this stay was denied by Judge Conger, District Judge of the Southern District of New York. On appeal, the order of Judge Conger was reversed by the Circuit Court of Appeals, Second Circuit, by order dated May 25th, 1942. The reversal was accompanied by an opinion written for the Court by Judge Swan.

Reasons for Granting the Writ

1—The decision of the Circuit Court below, 128 Fed. (2d) 521, is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, in the case of *Prudential Loan* v. *Robarts,* 52 Fed. (2d) 918.

2—The Court below erred in holding that the denial of a discharge in bankruptcy because of a prior discharge within six years, acts as a bar to a discharge in a subsequent bankruptcy proceeding brought after the expiration of six years.

3—The Court below erred in holding that the bankrupt was not entitled to a stay of proceedings under Section 11, subdivision a, of the Bankruptcy Act.

WHEREFORE, it is respectfully submitted that this petition for a Writ of Certiorari to review the Order and Judgment of the Circuit Court of Appeals for the Second Circuit should be granted.

Dated, August 18, 1942.

LOUIS P. RANDELL,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 128 Fed. (2d) 521.

Statement

The facts are stated in the Petition.

Specification of Errors

The errors which Petitioner will urge if the writ of certiorari is allowed are that the Circuit Court erred:

1. in holding that the denial of a discharge in bankruptcy because of a prior discharge within six years, acts as a bar to a discharge in a subsequent bankruptcy proceeding brought after the expiration of six years from the prior discharge.
2. in holding that the bankrupt was not entitled to a stay of proceedings under section 11, subdivision a of the Bankruptcy Act.

Summary of Argument

POINT I—The refusal of a discharge because of a prior discharge within six years, stands on a different footing from a refusal on any other ground set forth in Section 14c of the Bankruptcy Act.

POINT II—Section 11a of the Bankruptcy Act, in order to be consistent with Section 14c of the Bankruptcy Act, should be construed to permit a stay of proceedings of those claims dischargeable in bankruptcy.

POINT I

The denial of a discharge because of a prior discharge within six years, does not act as a bar to a discharge in a subsequent bankruptcy proceeding brought after the expiration of six years from the prior discharge.

Prudential Loan v. *Robarts,*
52 Fed. (2d) 918 (C. C. A. Fifth Circuit);
In the Matter of Dierck,
37 Am. B. R. (n. s.) 198 (U. S. D. C. S. D. N. Y.);
In re Simmerly,
38 Am. B. R. (n. s.) 425 (U. S. D. C. N. D. Ohio);
Collier on Bankruptcy,
14th Edition, Page 1371;
45 Harvard Law Review 1110.

In the case of *Prudential Loan* v. *Robarts* (*supra*), the Court, in a well considered opinion, squarely set forth the principle applicable to the present case, in the following clear and succinct language:

> "Manifestly the mere adjudication that Robarts was not on April 1, 1928 entitled to a discharge because six years had not elapsed since his last discharge on August 23, 1923 could not prove him disentitled on November 29, 1929. The refusal of a discharge because of a prior discharge within six years stands on a different footing from a refusal on any other ground set forth in Title 11 U. S. C. Section 32(b), 11 U. S. C. A. 32(b). The other grounds all involve reprehensible conduct of the bankrupt which Congress intended to punish by a perpetual refusal to discharge him from the claims of his then creditors. The purpose in adding the ground relating to the prior discharge within six years was not to punish but only to postpone a second discharge for that period of time."

The Court then said (at p. 920):

> "We conclude that a discharge denied on the sole ground that six years had not elapsed since a prior discharge is not a bar to a discharge applied for in another bankruptcy proceeding after the expiration of six years."

In the *Matter of Dierck* (*supra*), Judge Patterson writing for the United States District Court, Southern District of New York, said:

> "The second proceeding was altogether futile so far as discharge from debts was concerned, because any application for discharge that might have been made in it would necessarily have been within the prohibited six years period. Under the circumstances the failure to get a discharge in that proceeding did not render this debt bankruptcy-proof forever. On this feature Prudential Loan & Finance Co. v. Robarts (C. C. A. 5th Circuit), 19 Am. B. R. (N. S. 8, 52 Fed. [2nd]) 918, is directly in point. Nothing that has happened in the two preceding bankruptcies, therefore, will prevent a discharge in the present bankruptcy from having operative effect on the debt owed to this creditor."

The case of *In re Simmerly*, 38 A. B. R. (n. s.) 425, decided December 20, 1938, appears to be the latest case in which the question at issue was passed on. The Court there followed the doctrine set forth in the *Dierck* case and also the *Prudential Loan* case.

The *McCausland* case, upon which the court below based its decision, is not entitled to any consideration as against the authorities cited by petitioner's counsel.

The judge writing the opinion in that case, in referring to the question of a distinction between the refusal of a discharge because a prior discharge had been allowed within six years and the refusal of a discharge because of some fraudulent act or other condition specified in the Bankruptcy Act, said: "I have made a search of the law in an endeavor to find whether such a distinction may be applied and am unable to find anything which supports it."

Apparently, if he had been able to find anything in his search of the law to support such distinction, his decision might well have gone the other way. His search of the law was apparently not altogether thorough, or he would have found the *Prudential Loan* case, 52 Fed. (2d) 918 (decided in October 1931 by the Circuit Court of Appeals for the Fifth Circuit), which not only supports the distinction, but establishes it with such force and clarity, that we find that case being cited by other courts with full approval.

Even considering the question *de novo,* the result reached in the *Robarts, Dierck* and *Simmerly* cases is correct in principle.

The situation is analogous to a case, where under some provision of law (or contract) a claimant is required to allow a certain time to elapse before instituting a proceeding to enforce his claim. For example, under certain statutes a claimant is required to wait a certain period of time after presenting his claim against a municipality before bringing suit; in some instances, a six month waiting period is prescribed; in other instances a ninety (90) day waiting period is prescribed.

Similarly, under certain forms of insurance policies or under bills of lading issued by steamship companies or contracts of passage between a steamship company and passengers, the contract may contain a provision requiring the claimant to allow a certain waiting period to elapse after presenting a claim, before bringing a proceeding to enforce the claim under the policy or agreement in question.

Assuming that in any of the foregoing cases a claimant instituted his proceeding before the prescribed waiting period had elapsed and that in that proceeding he was defeated because his proceeding had been brought prematurely, can it possibly be claimed that that would be *res adjudicata* barring him from a recovery in a subsequent proceeding instituted by him after the prescribed waiting period had elapsed.

Likewise in the instant case, we submit that the bankrupt brought his second bankruptcy proceeding prematurely

because he did not allow six years to elapse subsequent to his discharge in the first proceeding. The denial of his discharge in the second proceeding upon the ground that this proceeding had been brought prematurely should not be held to constitute *res adjudicata* so as to prevent him from instituting a third proceeding after the six year period has elapsed, and obtaining his discharge in this third proceeding.

That is exactly in accord with the decisions in the *Robarts, Dierck* and *Simmerly* cases above referred to.

POINT II

Where a claim is dischargeable in bankruptcy, the bankrupt is entitled to stay a suit thereon under Section 11 subdivision a of the Bankruptcy Act. The Court below therefore erred in vacating the stay.

Section 11, subdivision a of the Bankruptcy Act, specifically provides for staying a suit based upon a claim dischargeable in bankruptcy.

The Court below, in vacating the stay, did so on the ground that the further provision in Section 11, subdivision a of the Bankruptcy Act provides "that such stay shall be vacated by the Court if, within six years prior to the date of the filing of the petition in bankruptcy such person has been adjudicated a bankrupt."

In adopting this view, we respectfully submit that the Court below erred. As pointed out in Collier on Bankruptcy, 14th edition at page 1155, this proviso for vacating a stay is new, and was added by the 1938 Act for the purpose of consistency with the terms of Section 14c (5) of the Bankruptcy Act.

Section 14c (5) provides that a discharge shall be denied where the bankrupt has within six years prior to bankruptcy, been granted a discharge.

Of course, if the bankrupt has within six years prior to the present bankruptcy been granted a discharge, so that

he cannot get a discharge in the present proceeding, there would be no reason for granting him a stay, staying a creditor from enforcing his claim, since this claim would in no event be discharged in the bankruptcy proceeding. The obvious purpose of the proviso in Section 11a for vacating a stay was to cover this situation.

Section 11a refers to the right of courts to grant stays of suits pending at the time of the filing of the petition, when such suits are founded upon a claim from which a discharge would be a release.

In re Alvino, 111 Fed. (2d) 642 U. S. C. C. 2nd Circuit;
In re Scheffler, 68 Fed. (2d) 902 U. S. C. C. 2nd Circuit.

If the bankrupt is entitled to a discharge in the present proceeding despite the fact that he was denied a discharge in a prior proceeding (as is the situation in the case at bar), there is no reason for denying him a stay. To deny him a stay or to vacate a stay granted him, would lead to the absurd result that the creditor would be permitted to enforce his claim by collecting perhaps in full while the bankruptcy proceeding was pending, even though at the conclusion of the proceeding the claim would be discharged by the discharge granted to the bankrupt. Furthermore, to permit this, would result in allowing the creditor whose claim is in suit to obtain a preference.

The absurdity of this result makes it apparent, that the true rule to apply to the granting or non-granting of a stay, should be whether the claim is one which is or is not dischargeable in the bankruptcy proceeding. If the claim is dischargeable, then the bankrupt is entitled to a stay of the suit based upon the claim; only if the claim is one not dischargeable, should the stay be vacated.

As already demonstrated under Point I, the claim of the respondent in the instant case is dischargeable in the present bankruptcy proceeding. It follows that the bankrupt was therefore entitled to the stay which was granted to him by the District Court, and that the vacatur of this stay by the Circuit Court was erroneous.

CONCLUSION

For the reasons heretofore assigned, it is respectfully submitted that the case is one which justifies the issuance of a writ of certiorari.

Respectfully submitted,

LOUIS P. RANDELL,
Attorney for Petitioner.

Press of Fremont Payne, Inc.
[26593]

Supreme Court of the United States

OCTOBER TERM, 1942.

No. 337

ARMAND TOKATYAN,

Petitioner,

against

MAX CHOPNICK,

Respondent.

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Attorneys for Respondent.

BENJAMIN HOWE CONNER,
Of Counsel.

LOUIS L. GARRELL,
On the Brief.

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OCTOBER TERM, 1942.

No.

ARMAND TOKATYAN,

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MAX CHOPNICK,

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On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

Opinion Below

The opinion of the Circuit Court of Appeals is reported in 128 F. (2d) 521.

Reasons for Denying the Writ

1. The issue raised does not involve any question of such general importance as to justify or merit review by this court.

2. There is no conflict of decisions among the various Circuit Courts of Appeal on any clear cut issue involving any principle of law calling for a definite formulation by this court for uniform application by the Federal courts.

Statement

On November 12, 1940, petitioner filed a petition in bankruptcy. He was at the time indebted to the respondent in the sum of $3,375 and listed the respondent in his bankruptcy schedules as one of his creditors.

A trustee in bankruptcy was appointed. Hearings and examinations were had by the Referee and Trustee in the course of the bankruptcy proceeding.

An action had been commenced by respondent in the City Court of New York against the petitioner to recover the moneys due him. The petitioner secured a stay of further prosecution of this action.

On the application of the petitioner for a discharge, specifications of objections were filed against discharge. The bankrupt had previously, and on February 20, 1935, received a discharge in a former bankruptcy proceeding, and this was one of the grounds of objection to his discharge in the second proceeding. The petitioner's application for a discharge was denied by an order of the Referee made June 19th, 1941, and this order was affirmed on petition to review, which came on to be heard before the Hon. John W. Clancey, District Court Judge. An order thereon was made on August 12th, 1941.

On October 18th, 1941, petitioner instituted a third bankruptcy proceeding and again immediately secured an *ex parte* order staying respondent from the prosecution of the action pending in the City Court.

For almost a year, the petitioner secured stays to enjoin the prosecution of the City Court action and the respondent was unable to proceed to reduce the debt, admittedly due, to judgment. During the period that these stays were secured by the petitioner, the petitioner earned substantial sums, no part of which was ever applied against his debt.

In the third bankruptcy proceeding, the respondent moved to vacate the *ex parte* order restraining him from

prosecuting his action. This motion was denied by the District Court. On appeal, the order was reversed and the stay vacated.

It is respectfully submitted that this decision was entirely proper and presents no question warranting review by this Court.

POINT I

The provisions of Sec. 11(a) of the Bankruptcy Act clearly required that the *ex parte* stay secured by the petitioner in his third bankruptcy should be vacated.

Sec. 11(a) of the Bankruptcy Act, enacted in 1938, after authorizing a stay of pending suits upon claims which would be released by a discharge, provides "that such stay shall be vacated by the Court if, within six years prior to the date of filing of the petition in bankruptcy, such person has been adjudicated a bankrupt".

The language of this section is clear and unambiguous. The petitioner here having been adjudicated a bankrupt on Nov. 12, 1940, the stay which he procured on Oct. 18th, 1941, manifestly should have been vacated. The order of the District Court denying the respondent's motion to vacate was, in the language of the Circuit Court, "flat in the teeth of this provision".

The District Court erroneously regarded the denial of the discharge in the second proceeding as rendering the whole second proceeding a nullity, including the petitioner's adjudication as a bankrupt (Rec. 41). As the Circuit Court very properly stated, there is no "statutory provision or legal principle which annuls an adjudication because a discharge is denied, whatever the ground for denial".

The reversal by the Circuit Court gave effect to the clear mandate of Sec. 11(a) of the Bankruptcy Act.

POINT II

Aside from the express provisions of Sec. 11(a) of the Bankruptcy Act, the Circuit Court properly held that the stay should have been vacated because the debt was no longer dischargeable.

The debt of respondent was listed in the second bankruptcy.

The petitioner applied for a discharge in this proceeding and following specifications and objections against this application and a hearing on the merits, an order was duly made denying the petitioner a discharge. This denial of a discharge by the Referee was affirmed by order of the District Court, and thus became *res judicata* with respect to the debt sought to be discharged.

It is well settled that a bankrupt cannot discharge a debt which was scheduled in a prior bankruptcy proceeding in which a discharge has been denied (*Freshman* v. *Atkins,* 269 U. S. 121; *In Re Schwartz* 89 Fed. (2d) 172 (C. C. A. 2d, 1937); *In Re Zeiler,* 18 Fed. Supp. 539; *In Re Gilson,* 12 Am. B. Rep. (n. s.) 325; *In Re Summer,* 107 Fed. (2d) 396 (C. C. A. 2d, 1939); *Perlman* v. *322 W. 72nd Street Co.,* 127 Fed. (2) 716 (C. C. A. 2d, April 11, 1942)).

The granting or denial of a discharge is an adjudication between the bankrupt and all parties duly scheduled or having notice amounting to *res judicata* that no other Court will allow to be impeached. *Blumenthal* v. *Jones,* 208 U. S. 64; *Matter of Feigenbaum* (C. C. A. 2) 121 Fed. 169; *Kuntz* v. *Young* (C. C. A. 8th) 131 Fed. 719; *Pollet* v. *Casel* (C. C. A. 1st), 179 F. 488; *Matter of Longham* (C. C. A. 3rd) 218 Fed. 619; *Bacon* v. *Buffalo Cold Storage Co.* (C. C. A. 5th), 193 Fed. 34; *In Re McCausland,* 9 Fed. Supp. 129 (S. D. Cal.), appeal dismissed 79 Fed. (2) 1001.

If we understand the petitioner's argument correctly, it is that the principle of *res judicata* should be here discarded; that instead of giving effect to a formal order denying a discharge as a final and conclusive adjudication, we should look behind the order to see what were the grounds therefore; and that it be determined from these grounds whether the final order is or is not to be deemed a binding adjudication. We respectfully submit that this argument finds no support in law. None of the cases which the petitioner cites support his argument nor are they applicable to the facts in this case.

As said by the Circuit Court: "We know of no statutory provision or legal principle which annuls an adjudication because a discharge is denied, whatever the ground for denial".

The Circuit Court in its opinion below held that the denial of the discharge because of a previous discharge within six years, as in the case at bar, or on some other ground specified in Sec. 14 of the Bankruptcy Act, barred an application in a subsequent bankruptcy proceeding for discharge from the same debts on the principle of *res judicata*. In this view the Circuit Court's opinion is sustained by the authorities.

In Re McCausland, 9 Fed. Supp. 129 (S. D. Cal.), appeal dismissed 79 Fed. (2) 1001, the facts were identical to those present in the case before this Court. There a creditor filed objections to the granting of a discharge on the ground that the bankrupt had been denied a discharge in a prior voluntary proceeding for the reason that such proceeding was instituted within six years of a prior bankruptcy proceedings. The creditor asserted that the denial of the discharge in the intermediate bankruptcy proceeding was *res judicata* with respect to the debts therein scheduled. The Court said:

> "This position seems to be thoroughly sustained by the authorities. Counsel for the bankrupt has en-

deavored to draw a distinction as to the effect of the refusal to grant the discharge where such refusal has been ordered merely because a prior discharge had been allowed within six years, as differing from a case where the discharge has been denied because of some fraudulent act or other condition specified in the Bankruptcy Act (§ 32, Title 11, U. S. C. A.) (Now § 14, Sub. C.). I have made a search of the law in an endeavor to find whether such a distinction may be applied and am unable to find anything which supports it. The rule of *res adjudicata,* as applied to an order refusing a discharge, seems applicable in all cases, regardless of whether there has been any misconduct on the part of the bankrupt. For instance, a bankrupt may fail to apply for a discharge within the time specified in the Bankruptcy Act. He may be guilty of no fraud in that regard, but merely have been neglectful in prosecuting the proceeding. Yet it is held in such cases, where he later petitions for a discharge in a new proceeding, he is not entitled to any order which will relieve him of the debts provable in the prior proceeding. Cases to this point are: *Kuntz* v. *Young,* 131 Fed. 719 (C. C. A. 8th); *In Re Weintraub,* 133 Fed. 1000 (D. S. N. J.); *In Re McMorrow,* 52 Fed. (2d) 643 (D. C. W. D. N. Y.)."

The debt being no longer dischargeable, the granting of a stay was improper and prejudicial and should have been vacated (*In Re Feifer,* 22 Fed. Supp. 541; *In Re Ridder,* 79 Fed. (2d) 524 (C. C. A. 2d).

The cases on which petitioner relies are clearly distinguishable factually from the case at bar and from the facts *In Re McCausland, supra.* In none of these cases was there a bankruptcy proceeding which ran its full course and which resulted in a final order denying a discharge. Thus, in *Prudential Loan & Finance Co.* v. *Robarts,* 52 Fed. (2d) 948 (C. C. A. 5), a discharge was never applied for and the proceeding was closed by the court. In *Matter of Dierck,* 37 Am B. Rep. (n. s.) 198 (S. D. N. Y.), a discharge was never applied for. *In Re*

Simmerly, 38 Am. B. Rep. (n. s.) 425 (N. D. Ohio), the proceeding was dismissed. So, in none of these cases relied on by the petitioner was there a final order denying the discharge, and consequently the principle of *res judicata* was in no way involved.

This distinction is pointed out *In Re Perry,* 50 Fed. (2d) 464. There the bankrupt obtained a discharge in his bankruptcy proceeding. He filed a second petition within six years, but this proceeding was dismissed. He later filed a third petition. Objections to his discharge were interposed by creditors whose debts had been scheduled in the intermediate bankruptcy proceeding. The court granted a discharge, stating, however, that had there been a denial of a discharge, it would have held otherwise, as appears at page 464:

> "If the proceedings in the second case had not been dismissed, and the bankrupt *had been denied a discharge,* or had failed to apply for a discharge, then the grounds set out by the objecting creditors would be good, and no discharge could be granted in this case as to their debts. *In Re Bacon,* 193 Fed. 34 (C. C. A. 5th): (Cert. Den. 225 U. S. 701):
>
> "It appearing from the above, however, that the second case was dismissed, and that such dismissal carried the entire proceeding out of court, with the same effect as if same had not been filed, such dismissal proceedings could not constitute *res adjudicata* as to the debts scheduled therein, especially in view of the fact that, not only were all the proceedings dismissed, but that there were never any proceedings filed by the creditors in the nature of proofs of claim or otherwise." (Italics ours.)

Thus, the authorities relied on by petitioner, cases where the second or intermediate bankruptcy proceeding never progressed beyond the stage of a simple filing of a petition or never resulted in a final order of discharge, are clearly distinguishable, on the facts, from the case under review, where, after a full hearing, the proceedings re-

sulted in a solemn and undisturbed order denying the bankrupt's application for a discharge of all the debts scheduled in such proceedings.

Furthermore, even if we regard the language of the court in the case of *Prudential Loan & Finance Co.* v. *Robarts, supra,* as indicating a view contrary to that adopted by the Circuit Court below, the view of the Circuit Court below presents no conflict of authority for the following reasons:

1. If, as indicated by the quotation from the *Prudential* case (Pet.'s Br., p. 4), a refusal of discharge because of a prior discharge is claimed to stand on a different footing because no reprehensible conduct is involved, then two immediate objections to this argument are evident. In the first place, there is nothing in the Bankruptcy Act which establishes a different rule of construction of an order denying a discharge because such order was made on one or another of the grounds specified in Sec. 14 of the Act. Had Congress desired to place a refusal of a discharge for one ground on a different footing from a refusal of a discharge on another ground, it could very well have so provided in the Act. But there is no such provision. If, indeed, a consideration of reasons was required as to every order denying a discharge, there would be no finality to such an order without an examination of the grounds upon which such order was predicated. A failure to apply for a discharge, as occurred in the *Prudential* case, might well have led the Court to regard the matter as one which, strictly speaking, did not involve a judicial determination to be respected under the principle of *res judicata.* Secondly, as noted before, the facts in the case under review differ, in that there has here been a full determination leading to a due final order. Moreover, if reprehensible conduct be the test of the *Prudential* case, then the order denying a discharge in the intermediate proceeding should be deemed a bar to

an attempt to secure a discharge in the third bankruptcy, for the facts clearly demonstrate such a course of conduct on the part of the bankrupt as to be properly called reprehensible. The record shows that the petitioner gained all the benefits and advantages accruing to an adjudicated bankrupt, secured successive stays thus gaining immunity from judgment for a period of approximately one year, and this course of conduct was manifestly preconceived and deliberate and was nothing short of toying with the court's processes, to frustrate the petitioner's creditors. Procedure of this questionable character, prompted by the desire to deliberately evade obligations and carry over beyond the six-year period from the first discharge, should not be condoned.

2. As said by the Court below, whatever the correct rule may have been prior to the amendment of Sec. 11(a), the amendment makes clear that the adjudication in the bankrupt's 1940 proceeding precluded the stay granted on his 1941 petition.

Under the present statute, there is no conflict as between the *Prudential* case, and the decision in the instant case. And the settled doctrine of *res judicata* is, in any case, applicable upon the facts in the instant case.

POINT III

No question of general importance and no conflict of decisions of the various Circuit Courts on a clear cut issue involving a general principle of law meriting the consideration of this Court, has here been shown.

It is respectfully submitted that there is no general principle of law involved in the instant case of such importance and of such a character as to warrant the consideration of this court. Nor has it been shown that there exists any such conflict of decisions on a clear-cut

issue involving a general principle of law, of a nature requiring a definite formulation by this court of a principle for uniform application by the Federal Courts.

The only Circuit Court decision claimed by the petitioner to have involved a different view from that taken by the Circuit Court in the instant case, was decided prior to the amendment of Sec. 11(a) of the Bankruptcy Act and any difference that might have been said to have existed prior to such amendment, as between the two decisions, is no longer arguable.

The thorough examination and consideration of the issues in the instant case by the Circuit Court are clearly evident from its opinion. Its decision is entirely supported by and in keeping with the statute and the well-established rules of law governing the situation here present.

CONCLUSION

The application for writ of certiorari should be denied.

Respectfully submitted,

CONNER & CHOPNICK,
Attorneys for Respondent.

BENJAMIN HOWE CONNER,
Of Counsel.

LOUIS L. GARRELL,
On the Brief.

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Supreme Court of the United States

OCTOBER TERM, 1942.

No. 337

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Respondent.

PETITIONER'S REPLY BRIEF

LOUIS P. RANDEL,
Attorney for Petitioner.

BENJAMIN PEPPER,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1942

No.

ARMAND TOKATYAN,

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MAX CHOPNICK,

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PETITIONER'S REPLY BRIEF

POINT I

There is a conflict between the Circuit Courts of Appeal as to whether the denial of a discharge in bankruptcy because of a prior discharge within six years, acts as a bar to a discharge in a subsequent bankruptcy proceeding brought after the expiration of the six years.

Despite the assertion by respondent's counsel in their brief to the contrary, a reference to the decision of the Circuit Court below, shows that Judge Swan who wrote the decision expressly recognized that there was a conflict between the *McCausland* case which the Court below followed and the *Prudential Loan & Finance Company* case.

In his opinion he said:

> "*Prudential Loan & Finance Co.* v. *Roberts*, 52 F. 2d 948 (C. C. A. 5) is to the contrary and Prof. Moore

> thinks it preferable to the *McCausland* decision. 1 Collier on Bankruptcy (14th ed.) page 1371. Cf. 45 Harv. L. Rev. 1110. We respectfully disagree and believe that the appellant's claim was not dischargeable in the third bankruptcy; consequently it was wrong to stay prosecution of it in the state court."

Since the decision of the Court below is likewise contrary to the decision of the Circuit Court of Appeals, 5th Circuit, in the *Prudential Loan & Finance Company* case, we have a direct conflict in the decisions between both Circuit Courts, on a question which has repeatedly arisen in numerous cases many of which are cited in the briefs of counsel in the instant case.

We respectfully submit that in view of this conflict of decisions, the writ should be granted so that this court can pass upon the question and decide which of the conflicting decisions correctly states the law. Otherwise, the question as to whether a bankrupt is entitled to a discharge under the circumstances existing in the present case remains in doubt, depending on whether a court follows the decision of the Circuit Court of Appeals in the 2nd Circuit or that of the Circuit Court of Appeals in the 5th Circuit.

The distinction attempted by respondent's counsel at pages 6 to 8 of their brief, between the cases relied upon by petitioner and the instant case, is without merit. For while it may be that in none of those cases was there a final order denying the discharge, an examination of the decisions in those cases (which have already been set forth under Point I of our main brief) shows that the circumstance of whether a discharge had been applied for or whether the previous proceeding had been closed or dismissed, could have had no bearing on the decision of the Court in those cases.

Nothing can be clearer or more direct than the statement by the Circuit Court in the *Prudential Loan & Finance Company* case (52 Fed. (2d) at page 920):

> "We conclude that a discharge denied on the sole ground that six years had not elapsed since a prior discharge

> is not a bar to a discharge applied for in another bankruptcy proceeding after the expiration of six years."

While the case of *In Re Perry* does make a distinction between a dismissal of a proceeding and a denial of a discharge, we submit that this distinction is without force, in view of the definite statement of the law in the *Prudential Loan & Finance Company* case, already referred to. Under this statement of the rule of law, it makes no difference whether the previous bankruptcy proceeding was dismissed or a discharge denied, provided that the denial of the discharge was on the sole ground that six years had not elapsed since a prior discharge.

The objection by respondent's counsel at page 8 of their brief that if a consideration of reasons was required as to every order denying a discharge there would be no finality to such an order without an examination of the ground upon which such order was predicated, is without force. For it is easy enough to look at the Court records of the prior proceedings which will disclose the reason for the previous denial of a discharge. If the records show that the discharge was denied merely because of the six year limitation, it would be apparent that an application for a discharge in a subsequent proceeding after the six year period had elapsed, was not barred.

In this connection, we call the Court's attention to the following statement of the Court in the *Prudential Loan & Finance Company* case (52 F. (2d) at 920):

> "The purpose in adding the ground relating to a prior discharge within six years was not to punish, but only to postpone a second discharge for that period of time."

This gives point to the contention advanced by us under Point I of our main brief, that the fact that a proceeding in bankruptcy was prematurely instituted should not act as an adjudication on the merits barring a discharge in a subsequent proceeding timely brought.

CONCLUSION

The application for a writ of certiorari should be granted.

Respectfully submitted,

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